

BUMIPUTRA-COMMERCE BANK BHD & ORS

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v.

BUMI WARNA INDAH SDN BHD

HIGH COURT, KUALA LUMPUR

b

ABDUL MALIK ISHAK J

[SUIT NO: D4-22-1970-2001]

30 OCTOBER 2004

CIVIL PROCEDURE: *Amendment - Defence - Application to amend defence pending appeal against summary judgment - Amendments to pleadings, principles - Real questions in controversy - Injustice - Whether proposed amended-defence diametrically different from original defence - Whether an afterthought - Whether bona fide - Whether prejudicial - Whether introduces new defences - Whether tantamount to an application to admit fresh evidence*

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The plaintiffs/banks had earlier obtained summary judgment against the defendant in respect of their RM43 million claim against the latter based on a loan facility. Pending its appeal to the judge-in-chambers, the defendant applied for leave to amend its defence. The senior assistant registrar ('SAR') rejected this application and the defendant appealed to the judge-in chambers once more. Before the judge-in-chambers herein, the plaintiffs objected to the defendant's proposed amended-defence on the grounds that it lacked *bona fide*, was applied for more than one year after the filing of the defence and after summary judgment had been entered, was an afterthought, and that it varied substantially from the original defence filed.

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Held (allowing the appeal):

[1] Amendments to pleadings may be sought and granted at any stage of the proceedings. 'The guiding principle of cardinal importance is that amendments ought to be made for the purpose of determining the real question in controversy or of correcting any defect or error in the proceedings. The object of the court is to decide the rights of the parties, and not to punish them for the mistakes they make in the conduct of their cases. There is no error or mistake (unless it is one involving fraud or deception) that the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy. Amendments are not regarded as a matter of favour or grace but of right.' 'Generally, the courts

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- a* allow such amendments as will cause no injustice to the other parties; and, in determining the question of injustice, they consider whether the application for amendment is *bona fide*, whether any prejudice caused can be compensated by costs, and whether the amendments will turn the suit into one of another and inconsistent character.’ (pp 828 b-i & 829 a-c)
- b* [2] The defendant’s proposed amended-defence did not plead anything that was diametrically different from the original defence. It did not seek to vary the original defence but merely to amplify it. Indeed, the proposed amended-defence was not an afterthought but was put forward upon the counsel of the defendant’s new solicitors who had just taken over the
- c* conduct of the case for the defendant; it was intended to set forth the real questions in controversy before the court. (pp 831 c-g, h & 832 a-b, f)
- d* [3] The defendant’s application for leave to amend its defence was, in all the circumstances of the case, *bona fide* and one which did not occasion any injustice to the plaintiffs. There was also no prejudice caused to the plaintiffs and thus no order as to costs ought to be made in respect thereof. (pp 833 f, h, 834 a-f, 835 e & 836 c)
- e* [4] The defendant’s application was simply one for leave to amend its defence pending its appeal against the summary judgment obtained by the plaintiffs. It should not be confused with an application for leave to admit fresh evidence, which it never was. No new defences were sought to be introduced by the proposed amended-defence. (pp 832 g-h, 833 a, 834 g-h & 837 b-c)
- f* [Appeal allowed; defendant allowed to amend defence.]
- Case(s) referred to:**
Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 CA (**foll**)
Amanah Merchant Bank Bhd v. Lim Tow Seng & Ors [1992] 1 CLJ 647; [1992] 2 CLJ (Rep) 55 HC (**foll**)
Baker Ltd v. Medway Building & Supplies Ltd [1958] 1 WLR 1216; [1958] 3 All ER 540 (**refd**)
Bloomer v. Spittle [1872] LR 13 (**refd**)
Cropper v. Smith [1883] 26 Ch D 700 (**refd**)
Eshah Sa’at v. Meriam Sa’at & Ors [1975] 2 MLJ 97 (**refd**)
Harris v. Pepperell [1867] LR 5 Eq 1 (**refd**)
Inzar Realty Pte Ltd v. Kenzo Tange Urtec Inc & Anor [1990] 3 MLJ 388 (**refd**)
Ismail Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor [1988] 1 CLJ 632; [1988] 1 CLJ (Rep) 606 HC (**dist**)
Jupiter Securities Sdn Bhd v. Wan Yaakub Ab Rahman [2002] 3 MLJ 264 (**dist**)
Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 (**refd**)
Lee Ah Lan v. Lee Kim Lan Construction Industries Sdn Bhd & Anor [2003] 2 CLJ 585 HC (**refd**)
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- Lee Tsing Choy v. Johari Jaalam* [1984] 1 CLJ 94; [1984] 2 CLJ (Rep) 148 HC (refd) **a**
- Lim Koon Ee v. Mohd Saad* [1962] 28 MLJ 242 (refd)
- Looi Guan Kway v. Low Lean Bok & Ors* [1938] MLJ 35 (refd)
- M-Fold Development Sdn Bhd v. Altrue Sdn Bhd* [2002] 2 CLJ 44 HC (foll)
- Mahan Singh v. Government of Malaysia* [1973] 2 MLJ 149 (refd) **b**
- Malayan Banking Ltd v. Ting Ee Ngieng & Anor* [1965] 2 MLJ 160 (refd)
- Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* [2003] 1 CLJ 12 CA (refd)
- Mortimer v. Shortall* [1842] 2 Dr & Raw 363 (refd)
- Paget v. Marshall* [1884] 28 Ch D 255 (refd)
- Pan-Electric Appliances (Pte) Ltd v. Electrical & Allied Industries Bhd* [1988] 2 CLJ 473; [1988] 2 CLJ (Rep) 104 HC (foll) **c**
- Ponnusamy & Anor v. Nathu Ram* [1959] 25 MLJ 228 (refd)
- Ribuwajar Development Sdn Bhd v. Ratus Mayang Sdn Bhd* [2002] 6 CLJ 56 HC (refd)
- Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 SC (refd) **d**
- Shoe Machinery Co v. Cultam* [1896] 1 Ch 108 (refd)
- Taisho Co Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 CLJ 703 (dist)
- Ultra Dimension Sdn Bhd v. Sepadan Tuah Sdn Bhd; Genesis The As Agency Sdn Bhd* [2000] 6 CLJ 548 HC (refd)
- Weeds v. Blaney* [1977] 247 Estates Gazette 211 (refd)
- Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC (refd) **e**
- Yoong Leok Kee Corporation Sdn Bhd v. Chin Thong Thai* [1981] 2 MLJ 21 (refd)

Legislation referred to:

Rules of the High Court 1980, O. 20 r. 5(1), O. 56 r. 1(3A)

Other source(s) referred to:

The Supreme Court Practice 1991, vol 1, part 1, p 365

For the plaintiffs - Khairuzzaman Muhammad; M/s Zul Rafique & Partners

For the defendant - Jayne Koe (Marcelle M Sinnappa); M/s Cheah Teh & Su

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malik Ishak J:

Introduction

The learned senior assistant registrar (“SAR”) dismissed with costs the defendant’s application by way of a summons in chambers for leave to amend its defence. Being aggrieved, the defendant filed a notice of appeal to the judge in chambers as seen in encl. 18.

a The Legal Principles For Grant Of Leave To Amend

First and foremost, there is O. 20 r. 5(1) of the Rules of the High Court 1980 ("RHC") which states as follows:

- b** Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

Then reference should be made to "*The Supreme Court Practice 1991*, vol. 1, part 1, at p. 365." There the general principles for grant of leave to amend are stated in lucid terms in this way:

- c** It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made 'for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins LJ in *G.L. Baker Ltd. v. Medway Building & Supplies Ltd.* [1958] 1 WLR 1216, p. 1231; [1958] 3 All ER 540, p. 546).

- d** It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right' (per Bowen LJ in *Cropper v. Smith* [1883] 26 Ch. D 700, p. 710-711, with which observations A.L. Smith L.J., expressed 'emphatic agreement' in *Shoe Machinery Co. v. Cultam* [1896] 1 Ch 108, p. 112).

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- g** Of course the leading authority on amendments is the Federal Court case of *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors.* [1983] 1 CLJ 191; ([1983] CLJ (Rep) 428). There Mohamed Azmi FJ delivering the judgment of the Federal Court laid down the tests to be adopted in considering whether an amendment ought to be allowed. At p. 192; (pp. 429-430) of the report, this was what his Lordship said:

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- i** The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in

effect turn the suit from one character into a suit of another and inconsistent character. (See *Mallal's Supreme Court Practice* page 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

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It must not be forgotten that amendments to pleadings may be sought and granted "at any stage of the proceedings". Indeed reported authorities are abound in the law journals which categorically show that amendments to pleadings are allowed before trial, during trial, before judgment, after judgment and even when there is a pending appeal against a judgment in a situation where the said judgment has been granted premised on the original un-amended pleadings. I must be forgiven if I were to cite these authorities not in its chronological order:

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(a) *Malayan Banking Ltd. v. Ting Ee Ngieng & Anor.* [1965] 2 MLJ 160, where McGilligan J granted the amendments to the plaintiff's statement of claim on the first day of the trial – before the trial started;

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(b) *Mahan Singh v. Government of Malaysia* [1973] 2 MLJ 149, where Sharma J granted amendments to the plaintiff's statement of claim on the third day of the trial;

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(c) *Lim Koon Ee v. Mohd. Saad* [1962] 28 MLJ 242, where Suffian J granted amendments to the defendant's defence after hearing and before delivery of judgment;

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(d) *Abdul Johari bin Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361, where the Court of Appeal accepted a passage from "*The Supreme Court Practice* (1995) volume 1, part 1" which stated that amendments may be allowed before, or at, or after the trial, or even before judgment or on appeal. Incidentally, the judgment of the Court of Appeal was written by Abdul Malek Ahmad JCA (now President of the Court of Appeal);

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(e) *Amanah Merchant Bank Bhd. v. Lim Tow Seng & 3 Ors.* [1992] 1 CLJ 647; [1992] 2 CLJ (Rep) 55 where Siti Norma Yaakob J (now FCJ) granted an oral application to amend the plaintiff's statement of claim during the hearing of the appeal to the judge in chambers against the decision of the SAR which had granted summary judgment; and

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- a* (f) *Pan-Electric Appliances (Pte.) Ltd. v. Electrical & Allied Industries Bhd.* [1988] 2 CLJ 473; [1988] 2 CLJ (Rep) 104 where Dr. Zakaria Yatim J allowed an application to amend the plaintiff's statement of claim which was filed after the O. 14 application was dismissed by the SAR and where an appeal to the judge in chambers against the said dismissal was still pending and had not been heard yet.
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At the local scene, the earliest reported decision would be that of *Looi Guan Kway v. Low Lean Bok & 4 Ors* [1938] MLJ 35, a decision of the Ipoh High Court by Aitken J. There his Lordship in an application to amend the plaint, after a survey of the relevant and pertinent authorities, restated the following germane principles:

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- (1) There is *bona fides* on the part of the applicant;
 - (2) They cause no prejudice to the other side which cannot be compensated by costs; and
- d*
- (3) They are not such as to turn a suit of one character into a suit of another and inconsistent character.

For the moment, I will leave the law on amendments and proceed to narrate the brief facts of the case. I will in due course revert back to the law.

e **The Brief Facts Of The Case**

The plaintiffs' claims against the defendant revolved on the alleged facility agreement dated 17 October 1995, a supplemental agreement dated 24 May 1999 and an exchange of correspondences dated 2 March 2000 and 7 November 2000. Quantum wise, the total amount claimed by the plaintiffs against the defendant excluding interest is in the region of RM43,429,703.94. It must be borne in mind that from the very outset the defendant has denied any liability to the plaintiffs and here the defence of the defendant dated 15 January 2002 would be germane and ideal to refer to. It is not in dispute that the plaintiffs have on 31 January 2003 obtained summary judgment against the defendant. The defendant had acted swiftly and had since filed a notice of appeal to the judge in chambers on 10 February 2003 against the decision of the learned SAR and the said appeal is presently pending before this very court.

h The plaintiffs vigorously opposed the defendant's application for leave to amend its defence on, *inter alia*, the following grounds:

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- (1) that the defendant purportedly lack *bona fide* as the application to amend its defence was made more than a year after the filing of the defence and after the summary judgment had been obtained;

- (2) that the matters that were sought to be raised by the defendant in the proposed amended defence was the result of an afterthought; and a
- (3) that there were substantial variations in the defendant's proposed amended defence from the original defence. b

To The Heart Of The Matter

The plaintiffs alleged that the defendant lack bona fide in that the deponent of the defendant's affidavit was also the deponent of the various affidavits filed on behalf of the defendant to oppose the plaintiffs' summary judgment application and the deponent in question had never at any time indicated that the affidavits affirmed by him contained errors. There was an explanation for all these queries. The defendant took the liberty of explaining in its affidavit in reply that at the time the defendant's affidavits to the plaintiffs' summary judgment application were prepared and filed the defendant was represented by a different firm of solicitors and it cannot be disputed that the advice of solicitors may differ from firm to firm and from time to time even though the respective solicitors may be looking at the same documents. It was averred that only after the defendant had changed solicitors that the defendant was advised that the original defence filed did not set out the relevant facts, issues and the real questions in controversy. The defendant was only advised and was made aware that the oral representations and assurances of the plaintiffs were capable of being enforced as against the plaintiffs when the defendant engaged its current solicitors. It was for that reason that the application for leave to amend its defence was filed by the defendant in order to correct the errors contained in the original defence and to set out all the relevant facts, issues and the real questions in controversy for this court to adjudicate upon. c

I have read the proposed amended defence and I must say that in essence it has not pleaded anything diametrically different from the original defence. The proposed amended defence has reiterated what the defendant in its original defence had all along maintained. It was this. That the defendant has a defence to the plaintiffs' claim and that the plaintiffs' claim ought to be dismissed with costs. In *Lee Ah Lan v. Lee Kim Lan Construction Industries Sdn Bhd & Anor* [2003] 2 CLJ 585, Low Hop Bing J allowed the application by the second defendant for leave to amend her defence and to delete her counterclaim against the plaintiff four (4) years after the commencement of the trial. The court certainly has the power to grant leave to amend and may even of its own motion order amendments of any of the pleadings. It must be emphasised that here the defendant has in its proposed amended defence merely amplified what was briefly pleaded in its original defence. There were no variations but rather mere amplifications. In *Lee Tsing Choy v. Johari Bin Jaalam* [1984] 1 CLJ 94; [1984] 2 CLJ (Rep) 148, Zakaria Yatim J was even d

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- a* bolder when his Lordship granted an application to amend the defence which merely contained a general denial. It was entirely up to me to decide whether to allow the defendant to amend its Defence and consequently to allow the appeal in encl. 18. That was entirely my prerogative.
- b* To say as was said by the plaintiffs that the matters that were sought to be raised in the proposed amended defence were afterthoughts were certainly mischievous, misconceived and baseless. The reason for the proposed amendment was due to the advice given to the defendant by its current solicitors. It would be foolish in the extreme for the defendant to adopt a strategy of filing an incomplete defence so as to lose at the SAR's level in relation to an O. 14 application and then to file an application for leave to amend the Defence before the appeal to the judge in chambers against the summary judgment was heard. In *M-Fold Development Sdn Bhd v. Altrue Sdn Bhd* [2002] 2 CLJ 44, 49, I had this to say of amendments:
- d* The courts have always been magnanimous in allowing amendments to the pleadings. It must be borne in mind that the proposed amendments did not add nor substitute a new cause of action. In fact, the facts of the case remained the same or substantially the same and it would certainly be just to grant leave to amend. The reasons for the delay in filing the application for the proposed amendments have been advanced and I have no qualms in accepting them.
- e* Indeed there was bona fide on the part of the defendant in seeking to amend the statement of defence. This was the approach which I adopted and the same approach was also advocated by the Court of Appeal in the case of *Taisho Co Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 CLJ 703.
- f* It was rather obvious that the proposed amended defence was just to allow the defendant to set out all the relevant issues for this court to adjudicate the relevant issues in dispute. I must reiterate that the defendant has also explained in its affidavits that the delay in filing this application was after being advised by its current solicitors to amend the original defence by incorporating the relevant facts, the issues and the real questions in controversy. I readily accept the explanation for the delay.
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- h* The crux of the plaintiffs' case for opposing the defendant's application to amend the statement of defence revolved on the workings of O. 56 r. 1(3A) of the RHC which relate to the introduction of fresh evidence. The plaintiffs have gone into great length to dissect the workings of that order even though the appeal in encl. 18 was against the decision of the learned SAR in refusing to allow the defendant's application to amend its defence. With due respect, the plaintiffs were clearly confused between two legal principles; one involving the introduction of fresh evidence and the other in regard to the amendment
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of the pleadings. With respect too, any argument in regard to the introduction of fresh evidence was entirely premature as there was no such application before this court. a

It was submitted that the defendant had through its solicitors informed the learned SAR of the defendant's intention to amend its defence even before the learned SAR had delivered her decision with regard to the plaintiffs' application for summary judgment. It was also submitted that the defendant's solicitors had further requested the learned SAR to defer her decision temporarily so as to enable the defendant to file its application to amend its defence first. But the learned SAR, so it was submitted, was not inclined to defer her decision after hearing the submissions of the plaintiffs' solicitors and, consequently, the learned SAR had allowed the plaintiffs' application for summary judgment. b
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The plaintiffs relied on the following cases:

- (1) *Ismail bin Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor* [1988] 1 CLJ 632; [1988] 1 CLJ (Rep) 606; d
- (2) *Taisho Co Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 CLJ 703, CA; and
- (3) *Jupiter Securities Sdn Bhd v. Wan Yaakub bin Abd Rahman* [2002] 3 MLJ 264 e

to show the lack of *bona fide* on the part of the defendant. But these cases can readily be distinguished. The cases of *Ismail bin Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor* (*supra*) and *Jupiter Securities Sdn Bhd v. Wan Yaakub bin Abd Rahman* (*supra*) involved a plaintiff/defendant attempting to raise and plead fraud at a much later date. And the rules governing amendments to pleadings to include a plea of fraud are much more restrictive than the general amendments as to pleadings simply because a plea of fraud must be raised at the earliest opportunity. f
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While the case of *Taisho Co Sdn Bhd v. Pan Global Equities Bhd & Anor* (*supra*) concerned an application to amend that was made four (4) years after the action was filed. There the plaintiff had sought to amend its statement of claim after the defendant's appeal to the judge in chambers against the decision of the SAR in striking out the defendant's defence had been heard and allowed. That too was at a much later stage in that it was after two rounds of hearing of the striking out application. Here before me, the case had gone one round of hearing only and that the second round of hearing in relation to the hearing of the appeal against summary judgment has yet to commence when the application to amend was filed. Furthermore in *Taisho's* case (*supra*), the Court h
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- a* of Appeal at p. 711 of the judgment found that “no reasons were given for the delay in filing the application when the point of admission was obviously available even before filing the proceedings”. The Court of Appeal in *Taisho*’s case took to task the plaintiff who was applying to amend its statement of claim by adding a new cause of action to overcome the defence of limitation.
- b* Whereas in the present case, it was purely a matter of analysing the facts and sifting through those facts in order to identify the issues. And unlike *Taisho*’s case what can be said to be a collateral agreement was not something as obvious as an “admission”. In my judgment, there was bona fide on the part of the defendant in seeking to amend its defence. There was also no injustice occasioned to the plaintiffs as a result of the proposed amendments to the defence.
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- It was argued that the plaintiffs could not be compensated by an order for costs if the court were to allow the defendant’s appeal in encl. 18 because summary judgment has already been entered against the defendant. But it must be borne in mind that the summary judgment obtained by the plaintiffs was for a liquidated sum. And that the learned SAR was informed of the defendant’s intention to amend its defence even before the learned SAR had delivered her decision pertaining to the plaintiff’s summary judgment application. The reluctance of the learned SAR to defer her decision in regard to the plaintiffs’ summary judgment application in order to enable the defendant to file an amendment of its defence merely strengthened the defendant’s case for an amendment because the court should have the benefit of all the relevant issues placed before it before making a final judgment on the merits or otherwise of the plaintiffs’ claim and the defendant’s defence.
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- f* Seen in this perspective, there was no prejudice occasioned to the plaintiffs and no costs ought to be awarded to them. In any event, the hearing of the appeal against summary judgment has yet to proceed.

- It was further argued that if the defendant’s appeal in encl. 18 was allowed it would amount to the defendant having a second bite at the cherry and that would put paid to the policy that there must be a finality to litigation. It seemed to me that these arguments were premised on the argument that the proposed amended defence sought to introduce fresh evidence. With respect, this was not the case. The defendant was applying to this court for leave to amend its pleadings and was not seeking leave to introduce fresh evidence.
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- h* In the event the defendant argues at the hearing of the appeal against the summary judgment and submits on fresh evidence, the plaintiffs are entitled to object to the inclusion of materials not originally adduced before the learned SAR and this court would decide at that material point of time as to the appropriate ruling to be made. Here presently before me the appeal was in regard to encl. 18 and the defendant was certainly entitled to apply to amend its defence in the interest of justice.
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The plaintiffs were worried that if the defendant's appeal in encl. 18 was allowed by this court that would affect the plaintiffs' chances of winning in the appeal filed by the defendant against the summary judgment obtained by the plaintiffs. In short, the plaintiffs were saying that the amendments to the defendant's defence must not be allowed as it would allow the defendant to succeed at their appeal in regard to the summary judgment that was obtained by the plaintiffs. With respect, these were nothing more than absurd arguments and totally devoid of merits.

Whether this court should allow the appeal in encl. 18 thereby allowing the defendant to amend its defence when the summary judgment had been entered and still pending appeal before this court, would entirely be an exercise in judicial discretion depending on the facts of the case. The Federal Court in *Yoong Leok Kee Corporation Sdn. Bhd. v. Chin Thong Thai* [1981] 2 MLJ 21 ruled that the learned judge was correct in exercising his discretion to allow an amendment of the statement of claim at the conclusion of the hearing after a full trial pursuant to O. 20 r. 5 of the RHC in the interest of justice. In *Lim Koon Ee v. Mohd. Saad (supra)*, Suffian J (as he then was) allowed amendments by the defendant after the conclusion of the trial but before delivery of the judgment on the ground of justice.

Justice of the matter seems to be the prevailing factor in allowing any amendment. And it is in the interest of justice that the proposed amendments to the defence ought to be allowed in favour of the defendant.

Now, the plaintiffs were not happy that the defendant was seeking to amend its defence in order to improve its case and its chances of winning. It must be borne in mind that the defendant, just like any other litigant, was entitled to amend its defence "at any stage of the proceedings" and this court in adjudicating encl. 18 must put that simple proposition of the law to the forefront.

The case of *Invar Realty Pte Ltd v. Kenzo Tange Urtec Inc & Anor* [1990] 3 MLJ 388 cited by the plaintiffs has no application to our present case because the defendant here unlike the plaintiffs in Invar's case was not attempting to withdraw an admission. Furthermore, the burden of proof lies with the plaintiffs to establish that it would suffer prejudice as a result of the amendments that could not be compensated by an order for costs (*Ribuwajar Development Sdn Bhd v. Ratus Mayang Sdn Bhd* [2002] 6 CLJ 56). I have held that there was no prejudice suffered by the plaintiffs. And that, at any rate, costs would entirely be for the court to decide and costs would not be granted as a matter of course. The defendant was certainly at liberty to amend its defence with costs to be incurred by the plaintiffs (*Ultra Dimension Sdn Bhd v. Sepadan Tuah Sdn Bhd; Genesis The As Agency Sdn Bhd (Third Party)*

- a* [2000] 6 CLJ 548). I reiterate that I subscribe to the general rule that costs are in the court's discretion. Whether costs ought to be granted would depend on the parties' conduct (*Harris v. Pepperell* [1867] LR 5 Eq 1 at 5). Where the plaintiff is entirely to blame, he will normally be ordered to pay all the costs (*Bloomer v. Spittle* [1872] LR 13 Eq 427 at 431, 432). However, if both
- b* parties are to blame, the court may refuse to make any order as to costs (*Mortimer v. Shortall* [1842] 2 Dr & War 363; and *Paget v. Marshall* [1884] 28 Ch D 255 at 267). In the context of the present appeal in encl. 18, the plaintiffs unfairly resisted the defendant's application to amend its defence notwithstanding the fact that the defendant was entitled to amend its defence
- c* at any time and so costs may be awarded against the plaintiffs even though the original mistake was due to the advice of the defendant's previous solicitors. Support for this simple proposition may be found in the case of *Weeds v. Blaney* [1977] 247 Estates Gazette 211 at 213, CA.

- d* Would the proposed amendments turn the suit from one character into a suit of another and inconsistent character? Certainly not. In its original defence, the defendant has denied liability and/or indebtedness to the plaintiffs. To me, the proposed amendments were based on the same existing facts and documents. The averments as contained in the proposed amendments were not set out in the original defence because the defendant was, at that material time,
- e* represented by a different firm of solicitors.

- It is a truism to say that every amendment of pleadings is to improve a litigant's chance of winning. There is nothing wrong in that. It is the right of every litigant to manoeuvre his way, upon legal advice, according to the RHC. The defendant here was doing just that. In my judgment, the defendant should
- f* not be denied leave to amend its defence in order to make good the defects in the pleadings so that the real issues between the parties would be tried and determined (*Lee Ah Lan v. Lee Kim Lan Construction Industries Sdn Bhd & Anor (supra)*).

- g* Next, it was argued that the defendant's application to amend if allowed would raise new issues and defences during the appeal against summary judgment and this would go against the provisions of O. 56 r. 1(3A) of the RHC. In rebuttal, I have this to say:

- h* (1) that an appeal from the decision of the SAR to the judge in chambers was by way of a re-hearing (*Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716, SC);
- (2) that the defendant merely sought to amend its defence and it was entitled to do so "at any stage of the proceedings";

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- (3) that it was not the intention of the RHC to prohibit or restrict amendments; and *a*
- (4) to rely on such cases like *Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* [2003] 1 CLJ 12 CA; *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70; *Ponnusamy & Anor. v. Nathu Ram* [1959] 25 MLJ 228; and *Eshah binti Sa'at v. Meriam Binti Sa'at & Ors* [1975] 2 MLJ 97 in support of the contentions that the proposed amendments were useless as the defendant would be caught by O. 56 r. 1(3A) of the RHC would be to overlook the fact that the defendant was not attempting to introduce any fresh evidence as alleged but rather to advance the real issues in dispute between the parties. Even if there was a new defence introduced by the proposed amendments (which was not the case here), this court should exercise its discretion in favour of the defendant since the proposed amendments relate to the same facts or substantially the same facts as originally pleaded in the original defence. I reiterate that the amendments should be allowed in the interest of justice. *b*
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Conclusion

For all the reasons as adumbrated above, I was more than satisfied that this was a proper case where I should exercise my discretion in favour of the defendant. This meant that the defendant was entitled to amend its defence so that the real issues in dispute between the parties could be determined, once and for all. This also meant that the defendant's appeal in encl. 18 should be allowed with costs. *e*

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